No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF ALASKA

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Petition For Writ of Certiorari To the United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1943, the Secretary of the Interior set aside a 1.8 million acre reservation in Alaska (less than one-half of one percent of the State's land area) to protect the hunting grounds of the Natives of Venetie and Arctic Villages ("Venetie Reservation"). Unlike almost all other Native villages in Alaska, the Natives of Venetie and Arctic Villages elected under section 19(b) of the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, 1618(b) ("ANCSA"), to acquire title to their existing reservation and thereby to forego any other land or economic benefits under the Act. The question presented is:

Whether the Ninth Circuit correctly held, based on the complete absence of language in ANCSA extinguishing Indian country in Alaska, that the Native Village of Venetie Tribal Government (which represents both Venetie and Arctic Villages) occupies Indian country and retains its inherent authority to tax business activities occurring within its territory in order to provide essential governmental services in an area not served by any other local government.

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INTRODUCTION

In this case the State of Alaska challenges the Indian country status of the Venetie Tribal Government's lands in remote north central Alaska, questioning the Tribe's authority to regulate the same lands it has continuously governed and occupied since before recorded history. In rejecting the State's challenge, the Court of Appeals applied two statutes: the "dependent Indian community" provision of the Indian country statute, 18 U.S.C. § 1151(b), and the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* ("ANCSA"). With respect to the former, the court applied the "virtually identical" standard developed by the First, Eighth and Tenth Circuits to conclude that the isolated Venetie Tribe occupies a "dependent Indian community" subject to tribal jurisdiction. With respect to the latter, a statute plainly unique to Alaska, the Court of Appeals concluded that Congress' absolute silence on the issue of Indian country left intact Venetie's Indian country status and the Tribe's resulting authority to regulate its own affairs. Neither conclusion merits further review in this Court.

First, the decision below is specific to Venetie's unique treatment under ANCSA, since Venetie elected to opt out of ANCSA's benefits in order to retain title to its 1943 Reservation. The limited scope of the Circuit's judgment thus does not carry with it the misleading, erroneous and exaggerated implications suggested by the State. Second, the judgment is entirely interlocutory, since the District Court has yet to address the battery of arguments advanced by the State against the particular tax challenged here, any one of which may moot the ruling below.

Third, there is no conflict between the Court of Appeals and the decisions of this Court or any other court. The Ninth Circuit's "dependent Indian community" ruling mirrors the standard developed by every other circuit to have considered 18 U.S.C. § 1151(b), and is in conformity with this Court's case law upon which § 1151(b) was based, *United States v. Sandoval*, 231 U.S. 28 (1913). Moreover, the precise situation here does not arise in other circuits. Further, the decision below is not in conflict with the rulings of the Alaska Supreme Court, which has never been called upon to rule on the Indian country status of any Alaska Native village, nor even considered questions of tribal sovereignty since the recent congressional and Executive reaffirmation of Venetie's (and other Native villages') federally-recognized tribal status.

Finally, the Court of Appeal's reading of ANCSA comports fully with this Court's admonition against implying a divestiture of Indian country status in a statute that is absolutely silent on the matter and whose legislative history does not even once mention Indian country or tribal jurisdiction. *Mattz v. Arnett*, 412 U.S. 481 (1973); *United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941). This is particularly compelling given Congress' continuous revisiting of ANCSA since 1971, as well as its treatment of Alaska tribes as inhabiting Indian country in scores of other congressional enactments.

COUNTER STATEMENT

1a. Respondent Native Village of Venetie Tribal Government, organized pursuant to § 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476, ("IRA") is the federally-recognized governing body of the Neets'aii Gwich'in, an Athabascan Indian tribe of some 350

enrolled members who reside in the "distinctly native villages" of Venetie and Arctic Village. Pet. App. 124a. The Venetie territory, set aside as a reservation in 1943 and later transferred to these villages in fee under ANCSA, is situated at the southern edge of the Brooks Range in north central Alaska and consists of some 1.8 million acres. *Id.*[1] All but a few residents of the area are Neets'aii tribal members. *Id.* 63a. There are no non-Native communities within the Venetie territory, and the "Venetie [Reservation area], in particular, is not materially different today . . . from what it was when first observed [by non-Indians] in the early 1900s." *Id.* 124a.

The entire 1943 reservation area is now owned by the Neets'aii Gwich'in ("Neets'aii") in communal fee and is governed by the Venetie Tribal Government. *Id.* There is no state-chartered government or any other form of local government. *Id.* 63a.[2] No road or railroad serves the area. The two villages are accessible only by air on a year-round basis, by boat in the summer and by dog team or snowmobile in the winter. *Id.* 61a. "With the exception of modest houses and a very few public buildings which serve the Neets'aii Gwich'in almost exclusively, the area is totally undeveloped." *Id.* While benefitting in recent years from various federal and state health, education and social welfare

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[1] Alaska comprises some 371,000,000 acres, more than twice the size of the State of Texas. This case involves only a small fraction of that enormous expanse.

[2] Unlike other states, not all areas of Alaska are within an organized "borough" (Alaska's version of a county). Instead, most of Alaska is within the "unorganized boroughs", *see* Alaska Const. art. X, § 6. Alaska's other form of state-chartered local government is a municipality. The Venetie territory is not within any "organized borough" nor does it encompass any state municipality.

programs, the Neets'aii continue to follow a traditional "subsistence" way of life based on hunting, fishing and gathering. *Id.* 62a. The lands owned and controlled by Respondent Venetie Tribal Government are used for this purpose. *Id.*

b. In 1938, the Neets'aii petitioned the Secretary of the Interior to set aside a portion of their aboriginal lands as a reservation to protect their exclusive use and occupancy. *Id.* 115a. Pursuant to a Secretarial election, the Neets'aii ratified an IRA constitution on January 25, 1940, and in 1943 the Secretary, under Congressional authority, withdrew the requested 1.8 million acre Reservation. *Id.* 2a. The Venetie Tribal Government governs this land and the Neets'aii Gwich'in Tribe, while the two local councils perform daily law and order functions in the villages in coordination with the central Tribal Government. Together, the Tribal and Village Councils maintain the peace, provide for the general welfare of all inhabitants, and enforce local law. *Id.* 125a.

c. In the late 1960s the Neets'aii land base was threatened by the impending congressional land claims legislation which proposed replacing all reservations and aboriginal land holdings in Alaska with a population-based Native land selection regime. *Id.* 116a. In response, the Neets'aii sought to be included in a proposed amendment that would allow them to opt out of the legislation and retain title to their 1943 Reservation lands. *Id.* This effort succeeded.

While § 1618(a) of ANCSA revoked "the various reserves set aside" for Alaska Natives by prior legislation or executive action, § 1618(b) allowed Tribes such as Venetie and Arctic Village to secure fee title to their former reservation lands in lieu of sharing in the monetary, land, regional corporation and other land settlement provisions of

the Act. On November 10, 1973, the Neets'aii of the Venetie Reservation voted to opt out of ANCSA, and to instead take title to their 1943 Reservation lands. Pet. App. 116a. The United States then conveyed the Reservation lands in a unitary conveyance to the two ANCSA village corporations in fee simple as tenants in common.[3] *Id.* 117a. In 1979, the tribal membership, acting through the two village corporations, reconveyed their 1943 Reservation lands to the Venetie Tribal Government. *Id.* The two village corporations then ceased to function and were dissolved. *Id.*

2a. In 1978, acting pursuant to its authority as a federally recognized Indian Tribe "to control economic activity within its jurisdiction, and to defray the cost of providing governmental services," *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982), the Venetie Tribal Government (hereinafter "Venetie") adopted a five percent gross receipts tax, later to be replaced with a five percent business activities tax,[4] on businesses operating on the

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[3] Although ANCSA gave Tribes like Venetie and Arctic Village the choice of opting out, the Act nonetheless required that the opt out election be made by a "Village Corporation or Corporations." 43 U.S.C. § 1618(b). As a consequence, the Act compelled Venetie and Arctic Village to form new corporate entities. Only six of the over 200 tribes affected by ANCSA pursued this opt out election, including Elim, the Gambell and Savoonga communities on St. Lawrence Island, and the Northway Indians of the Tetlin Reserve. *See also Doyon Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491 (9th Cir. 1978) (Venetie and Arctic Village Natives not considered ANCSA shareholders for purposes of regional corporation land selection entitlements measured by shareholder counts). Having opted out, the Villages were not required to reconvey any lands to the State or other municipalities under § 1613(c) of ANCSA.

[4] The amended tax was modeled after the tribal tax approved by this Court in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

Tribe's lands within its territorial jurisdiction. Pet. App. 87a. In 1986, the Tribe attempted to enforce this tax against Neeser Construction Company in connection with a state-funded school construction project. After payment was refused, the Tribe filed suit against the construction company in the Venetie Tax Court. *Id.* 129a. Although the State by contract had agreed to reimburse Neeser for any Tribal tax ultimately found to be due,[5] the State refused to defend in tribal court and instead brought a federal action in 1987 in the District of Alaska for declaratory and injunctive relief. *Id.* Venetie moved to dismiss, based on its sovereign immunity from suit and the State's failure to exhaust tribal court remedies. *Id.* The District Court issued a preliminary injunction enjoining the Tribe from further enforcement of the tax in Tribal Court pending the outcome of the federal action. *Id.*

b. On appeal, the Ninth Circuit upheld the injunction, holding that the validity of Venetie's tax turned on whether Venetie is a federally recognized tribe occupying a "dependent Indian community" under 18 U.S.C. § 1151(b). Pet. App. 137a-138a. The Ninth Circuit adopted the Eighth and Tenth Circuits' approaches for determining the existence of a "dependent Indian community," and remanded the case to the District Court. *Id.* 139a-140a.

c. On remand after trial, the District Court affirmed Venetie's tribal status, but held that it does not occupy Indian

[5] *See* Pet. at ii ("Under the contract the State assumed liability for [Venetie's] taxes").

country.[6] *Id.* 27a, n.6. The District Court conceded in a separate opinion that up "[u]ntil 1971 ... the Neets'aii Gwich'in were treated by Congress and the Executive agencies as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b)," *id.* 67a. Nonetheless, the District Court found that ANCSA had implicitly extinguished Venetie's dependent Indian community status. *Id.* 71a.

d. On appeal, a unanimous panel reversed. On the ANCSA issue, the Court held that "ANCSA does not contain a definitive statement expressing its effect upon Indian country in Alaska ... . Accordingly ... ANCSA did not extinguish Indian country in Alaska, and ...Venetie, having demonstrated that it qualifies as a dependent Indian community, occupies its territory as Indian country." *Id.* 32a. Judge Fernandez wrote separately, concurring in the result that "ANCSA did not eliminate Indian country in Alaska ... . I agree that Venetie's territory is Indian country, if any still exists in Alaska." *Id.* 36a.

On the Indian country issue, the court below applied this Court's decisions in *United States v. John*, 437 U.S. 634 (1978), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and held that a federal set aside of land and federal superintendence over a community are necessary elements of a dependent Indian community under 18 U.S.C. § 1151(b). Pet. App. 11a. The court found that Venetie's land met the "set aside" requirement, notwithstanding Congress' use of Native village

[6] The State did not appeal from that judgment. The State's recognition that Venetie is a sovereign tribe but its refusal to recognize Venetie's jurisdiction over its land, would create the anomaly of Venetie being a Tribal government with no territory to govern.

business corporations to initially receive the land, because (among other things) under ANCSA Natives "own and manage the corporations," *id.* 15a; membership in the corporations is restricted to Natives, *id.*; the village corporations enjoy immunities from various tax and securities laws, *id.* 16a, 17a, n. 3; village corporate stock is inalienable, *id.* 17a; and voting rights in village corporations are restricted to Native shareholders notwithstanding inheritance later by non-Native persons. The court added that tribal ownership in fee does not automatically foreclose the land's Indian country status, *id.* 18a (*citing United States v. Sandoval,* 231 U.S. 28, 48 (1913)).

The Ninth Circuit's analysis then focused specifically on Venetie:

> Venetie presents an especially compelling illustration of this conclusion. Section 1618(b) of ANCSA permits a village corporation to acquire title to 'any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971.' In exchange, the village corporation forfeits any claim to land or funds distributed by the regional corporation under ANCSA. When the members of the Venetie and Arctic Village corporations voted to exercise their rights under § 1618(b), they received a parcel of land that mapped the former reservation of their common Tribe -- the Neets'aii Gwich'in. Title to this former reserve was subsequently transferred to Venetie, effecting the result made possible by § 1618(b): reunification of the Tribe and its reserve land.

Pet. App. 30a-31a.

The court below also found that Venetie satisfied the federal superintendence requirement, noting that the special federal-tribal trust relationship survived ANCSA, *id.* 19a; that federal superintendence over a community need not be "dominant" or "pervasive" over state activity (as the district court ruled) nor exclusive of state participation for Indian country status to continue, *id.* 20a (*citing Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976));[7] that Congress in ANCSA expressly preserved the Federal-Indian trust relationship and rejected alternative proposals that would have transferred all federal responsibilities to the State, *id.* 21a; that Congress has included Alaska tribes in virtually all federal Indian legislation enacted after ANCSA reflecting its continuing federal superintendence, *id.* 21a-23a; and that Congress has also retained a guiding hand over the affairs of the Native corporations established pursuant to ANCSA, *id.* 23a. The Court of Appeals further noted that to the extent ANCSA is ambiguous, this Court's precedents require that "doubtful expressions be resolved in favor of the Indians." *Id.* 24a, *citing Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918).

The court concluded that "Venetie is a dependant Indian community and that, accordingly, its territory qualifies as Indian country." *Id.* 26a, 30a. The Court of Appeals

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[7] "This analysis indicates that the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities, rather than whether the state government has been injected into tribal affairs." Pet. App. 20a. Far from abandoning its trust responsibilities, the federal government annually appropriates roughly one-half billion dollars for Alaska Native programs. *See* Brief Amicus Curiae of the Native Village of Barrow, et al. at 10-15 filed in the court of appeals.

remanded the case to the district court to "determine whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation." *Id.* 32a.

e. On January 6, 1997, the panel unanimously rejected the State's petition for rehearing, and no circuit judge voted to rehear the matter *en banc*. *Id.* 143a. With Venetie's consent the Ninth Circuit granted a stay of its mandate pending the disposition of the State's petition. *Id.* 142a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE JUDGMENT BELOW IS SPECIFIC TO VENETIE AND DOES NOT PRESENT AN EXTRAORDINARY QUESTION WARRANTING THE EXERCISE OF THIS COURT'S DISCRETIONARY REVIEW.

1. As the decision below reflects, this case is highly fact-specific to Venetie -- it involves both the Tribe's unique history and treatment under ANCSA (a statute unique to Alaska), and the Tribe's character today. The Court of Appeals was called upon to apply ANCSA and other principles of federal Indian law to Venetie, and rested its judgment specifically on the facts pertaining to Venetie. Such a judgment does not warrant review by this Court.

Venetie opted out of ANCSA precisely to preserve the Tribe's 1943 Reservation land base.[8] As the Ninth Circuit emphasized, Congress deliberately provided for "the reunification of Venetie with its former reservation -- an assertion that is somewhat less straightforward where Native corporation land does not share such a close association with former tribal land." *Id.* 31a. Only four other remote tribes in Alaska similarly opted out of ANCSA and none of them share the same factual setting considered crucial by the court below.[9]

It is speculative for the State to conclude that the judgment below will extend to other Native communities that did not opt out of ANCSA.[10] Indeed, even Alaska's Attorney General has acknowledged that "the ruling may not

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[8] The technical revocation of the land's "reservation" status, 43 U.S.C. § 1618(a), merely permitted Venetie's lands to be conveyed in fee, and did not alter its Indian country status.

[9] *See* Pet. App. 26a ("the district court's factual findings actually support the determination that the land owned by Venetie is Indian country. We proceed to illustrate this point by examining the relevant factors of our six-pronged inquiry...."); *id.* 27a-31a (reviewing *inter alia*, the nature of the Venetie area and its use, the current and historic relationship of the area inhabitants to the Tribe, the practice of government agencies toward the Tribe, the land's ownership, the degree of cohesiveness among the inhabitants of the area, and the extent to which the lands at issue were set aside for Venetie, including the 1943 set aside of a reservation for the Tribe).

[10] Petitioner's repeated assertions that the Ninth Circuit's opinion has broad application to some 40 million acres, or roughly 11% of the State (*see, e.g.*, Pet. App. 3) is hyperbole not supported by the judgment below. Under ANCSA 20 million acres were set aside by Congress for the shareholders of Native *regional* corporations, not for Tribes, much less for Tribes like Venetie that opted out of the ANCSA land regime.

extend to other villages that did not opt out of ANCSA."[11] Not only is ANCSA a statute unique to Alaska, its singular application by the court below is unique to Venetie. As such, this case does not merit review.[12]

2. Although this case strictly involves Venetie's authority to tax activities on its own lands in its own Indian country, the State would have this Court believe far more is at stake. The State speaks colorfully of "enormous consequences," Pet. 3, "crippling the State's ability to implement crucial state-wide regulatory programs," *id.* at 4, "plung[ing] [Alaska] into ... chaos and confusion," and inspiring a "blizzard of litigation." *Id.* at 4, 10. As examples, the State claims the decision below will deny it virtually all jurisdiction in Venetie and other Indian country areas that may exist, precluding the State from regulating hunting and fishing, tribal gambling, and state taxation. *Id.* at 12.

The decision below involves none of these consequences. First, as a general proposition the issue of state jurisdiction in Indian country involves an entirely different analysis (a particularized balancing of competing interests) than the issue of retained tribal sovereignty (which survives unless and until expressly extinguished by Congress or as a necessary result of a tribe's dependent status.)

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[11] Don Hunter, *State to Seek Quick Appeal of Sovereignty Ruling*, ANCHORAGE DAILY NEWS, November 22, 1996 at 1.

[12] The Petition conveniently expounds at length on selected portions of the opinion below that are not specific to Venetie, and ignores all passages that are. But this Court reviews "judgments, not statements in opinions," and the judgment below is plainly specific to Venetie. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982).

(*Compare e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980) (state taxation) with *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (tribal taxation)). Nowhere in its decision was the Ninth Circuit called upon to consider, nor did it express any opinion on, the extent of *state* jurisdiction in Venetie over any matter whatsoever. Such issues, should they ever be litigated, are for another day.

Second, the State's identified concerns are ephemeral. The State raises the specter of tribal treaty hunting and fishing rights operating outside state regulation, Pet. 12 (*citing*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)), even though there are presently no treaty hunting and fishing rights in Alaska, even though all Alaska Native aboriginal hunting and fishing rights (including Venetie's rights) were extinguished in ANCSA by 43 U.S.C. § 1603(b), and eventually replaced with a scheme of cooperative federalism set forth in Title VIII of the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 3111 *et seq.* Under that Act, the federal government regulates and protects a subsistence priority for rural hunting and fishing on all federal public lands, waters, and interests therein, while the State regulates all other areas.[13] Thus, fish and game management is already divided along jurisdictional lines dependent on land ownership. The State even suggests an impact on public access across Native lands for hunting and fishing, Pet. 15, n. 10, conveniently

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[13] *See Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 1672 (1996); *Native Village of Quinhagak v. United States*, 35 F.2d 388 (9th Cir. 1989). As it does here, the State in *Babbitt* argued to this Court that federal regulations of federally-reserved waters would bring disaster to Alaska's fisheries. Since this Court's denial of certiorari nothing of the kind has happened, nor is even contemplated.

forgetting that (putting aside the decision below) Venetie's lands already are *private* tribally-owned lands, not public state lands.

The State also raises the specter of tribal casino gambling operating outside state regulation, *id.*, even though no tribal casino gambling is possible in Alaska since all forms of casino gambling have been prohibited under state law since 1995.[14] The State further raises the specter of a total bar to state taxation due to the Indian country ruling (1) even though ANCSA already *expressly* exempts from state taxation the undeveloped Venetie lands declared to be Indian country below, 43 U.S.C. §§ 1620(d) and 1636(c)(2)(B), and (2) even though there is not today and never has been *any* state-chartered municipality that would be in a position to impose a tax on Venetie's lands.[15]

As the foregoing discussion reflects, the State's professions of alarm are unfounded. On the facts of this case the decision below is unremarkable with unremarkable consequences. Indeed, as the State must concede, in the one area typically of greatest interest to state governments today--criminal law enforcement--the ruling below leaves unaffected the State's law enforcement machinery in Venetie by virtue of Public Law 83-280, 18 U.S.C. § 1162(a), which not only contemplates the existence of Indian country in

[14] ALASKA STAT. 15-5-100(d) (1995).

[15] The State decries the prospect of tribal taxation of Indian country lands as posing "a significant impediment to future economic development in the State." Pet. at 16, a proposition that makes no sense, for Venetie would be taxing itself and along the way discouraging others from engaging in the very economic development that is so sorely needed in Venetie.

Alaska, but expressly confers upon Alaska general criminal jurisdiction over "All Indian country within the State, except ... the Metlakatla Indian community... ."

II. THE JUDGMENT BELOW LACKS FINALITY AND DOES NOT WARRANT REVIEW AT THIS TIME.

The opinion below lacks finality. The lower courts have yet to determine whether the contested tax is, in fact, a valid exercise of Venetie's retained right of self-governance. It is for this reason that the Ninth Circuit remanded the case to the District Court for further proceedings to determine "whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation." Pet. App. 32a. The State's amended complaint further challenges the tax, among other things, as contrary to the law governing tribal regulation of non-Indians set forth in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), matters yet to be addressed by the District Court.[16]

This Court has long followed the practice of declining to "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the

[16] The State has also challenged Venetie's tax on the grounds it violates the Indian Commerce and Due Process clauses of the United States Constitution, art. X, § 2 of the Alaska Constitution, and the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. §§ 1302(8). *See* State's Complaint, CR-1, ¶¶ 25 & 26 at 8. These challenges must likewise be decided on remand, any one of which, if successful, may moot the ruling below.

cause." *American Const. Co. v. Jacksonville Ry.*, 148 U.S. 372, 384 (1893). The lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Given the limited scope of the judgment below, this case does not present any "extraordinary" circumstances mandating immediate review, and the lack of finality provides a sufficient basis for denial of the petition. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari). *See generally* Robert L. Stern, *et al.*, *Supreme Court Practice* 196 (7th ed. 1993).

III. THE NINTH CIRCUIT'S INDIAN COUNTRY ANALYSIS IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS, THE ALASKA SUPREME COURT OR THE DEPARTMENT OF THE INTERIOR'S TRADITIONAL VIEWS.

1a. The Ninth Circuit's application of the "dependent Indian community" provision of 18 U.S.C. § 1151(b) to the unique facts and legal background of Venetie is fully consistent with the analytical framework articulated by the other Circuit courts; the State's contention otherwise is simply wrong. By expressly adopting the "virtually identical" First, Eighth and Tenth Circuit approaches for identifying a "dependent Indian community" (Pet. App. 13a.), the court below deferred to the greater experience of

those other Circuits and went out of its way to seek uniformity and avoid conflict.[17]

Indeed, none of the Circuits have adopted a *per se* rule that lands *must* be owned by the federal government in order to qualify as Indian country under § 1151(b).[18] Such

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[17] Contrary to the State's assertion, Pet. 25, Venetie would have achieved the same result under the First Circuit's analysis. In *Narragansett Indian Tribe v. Narragansett Elec. Co. ("Narragansett II")*, 89 F.3d 908 (1st Cir. 1996), the First Circuit endorsed the Tenth Circuit's decision in *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971), and the Eighth Circuit's opinion in *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), to determine whether private land purchased by a Tribe *outside* the tribal community for a future tribal housing project was a dependent Indian community immune from state regulation. 89 F.3d at 917. The First Circuit concluded that the project land failed both the federal set-aside and federal superintendence criteria because a finding of Indian country under such circumstances would amount to the unilateral tribal creation of Indian country without a considered decision by the federal government concerning the lands at issue. The First Circuit, however, carefully distinguished between the lands purchased by the Tribe outside its community and the nearby lands of the community acquired under the Narragansett Land Claims Settlement Act. As to the latter, the court reaffirmed that such lands *had* been set-aside and found them to be Indian country. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) ("*Narragansett I*"). ANCSA likewise was a land claim settlement, and clearly under *Narragansett I* the First Circuit would reach the same conclusion, by the same mode of analysis, as did the Ninth Circuit below.

[18] *E.g., Narragansett II*, 89 F.3d at 917 ("The fact that the Tribe, not the government, owns the lands does not preclude a finding that the housing site is a dependent Indian community"); *Martine*, 442 F.2d at 1023 (Ramah community lands purchased by the Navajo Tribe with tribal funds found to be a dependent Indian community). *Cf. South Dakota*, 665 F.2d at 842 (citing *Martine* approvingly and stating "The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard" (citations omitted)); *Indian Country, U.S.A.*

a rule would conflict with precedents of this Court finding a dependent Indian community to exist where, like Venetie, lands are owned by a Tribe in communal fee simple. *See, e.g., United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926).[19] Such a rule would also conflict with Congress' intent that "the terms of section 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries." Felix S. Cohen, *Handbook of Federal Indian Law* 39 (1982 ed.) There is thus no intercircuit conflict demanding resolution by this Court.

b. Nor does this case call for a nationally binding pronouncement on the test for a "dependent Indian community." While neither this Court nor Congress has expressly defined the statutory term "dependent Indian community," this Court has developed "[a] clear body of [Supreme] Court precedent [that] emphasizes two central features of the inquiry into whether a given area constitutes Indian country: "first, whether the territory is 'validly set apart for the use of the Indians as such,' and second, whether the Natives who inhabit it are 'under the superintendence of the [federal] government.'" Pet. App. 6a-7a, *citing Oklahoma Tax Comm'n*; *John*; *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*,

v. Oklahoma Tax Comm'n, 829 F.2d 967, 975 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) ("Patented fee title is [ ] not an obstacle to either reservation or Indian country status of Creek Nation lands").

[19] A rule *requiring* federal ownership of lands would effectively write the "dependent Indian community" provision of § 1151(b) out of the statute, for any community whose lands had been set aside in reservation or trust status would already satisfy the § 1151(a) "reservation" provision. *Oklahoma Tax Comm'n*, 508 U.S. at 123.

232 U.S. 442 (1914). Following these precedents, all of the Circuit courts that have addressed the issue have developed analytical frameworks that incorporate these two main elements into a more detailed functional inquiry into the nature of the community.[20] The functional approach has been embraced as a means of maintaining flexibility in addressing the diversity of Indian communities occupying Indian country from state to state.[21] Indeed, the two Circuits with the greatest experience in this area recognize that the dependent Indian community analysis "'must be a flexible one, not tied to any technical standard.'" *South Dakota*, 665 F.2d at 842 (citation omitted). "'Any single talismanic standard . . . could not be allowed to defeat the purpose of § 1151(b).'" *Blatchford v. Sullivan*, 904 F.2d

[20] *See, e.g., Blatchford v. Sullivan*, 904 F.2d 542, 548 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991); *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 549 U.S. 823 (1982); *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir. 1991), *cert. denied*, 500 U.S. 941 (1991); *United States v. Levesque*, 681 F.2d 75, 77 (1st Cir. 1982), *cert. denied*, 459 U.S. 1089 (1982). Pet. App. 8a. This Court's consistent denial of certiorari review of the various Circuit analysis further belies the State's contention that they are in conflict.

[21] The discussion of "community of reference" in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1543-45 (10th Cir. 1995), underscores the diversity of communities which have been found to be "dependent Indian communities." These include the scattered New Mexico pueblos that own their lands in communal fee simple, *see Sandoval*, *Candelaria*, and *Chavez*; the off-reservation Ramah Navajo community, *see Martine*; the Reno Indian Colony of Nevada, composed of several hundred Indians gathered together on a 28.38 acre tract of land, *McGowan*; a South Dakota housing project within a disestablished reservation, *South Dakota*; and a Cheyenne River Indian housing project, *United States v. Mound*, 477 F. Supp. 156 (D.S.D. 1979).

542, 546 (10th Cir. 1990) (citation omitted).[22] And while the Circuit tests may vary in expression, they are not inconsistent. As this Court recently emphasized, "the intent of Congress in 18 U.S.C. § 1151 as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Oklahoma,* 508 U.S. at 125 (1993) (*quoting* Cohen at 34).

2. Contrary to the State's assertions (Pet. App. 20), there is no meaningful conflict between the decision below and the Alaska Supreme Court's judgment in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). *Village of Stevens* did not involve the issue of Indian country; it involved a contract dispute between a business and a tribal government, and the issue was whether the Tribe could defend a state court action by invoking tribal sovereign immunity from suit. Relying heavily on selective historical distinctions between Alaska Native villages and tribes elsewhere, the Alaska Supreme Court held that Stevens Village lacked sovereign immunity because it was not a Tribe.[23] 757 P.2d at 34.

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[22] *See also* Cohen at 39: ". . . 18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection. This definition supplanted the earlier reliance on land title, which had become impractical owing to allotments, reservation openings and rights-of-way."

[23] The Alaska Supreme Court's decision was several years prior to the clarifying action of the Secretary of the Interior and of Congress confirming the federally-recognized tribal status of various Alaska Native villages including Venetie. *See e.g.,* Indian Entities Recognized and Eligible to Receive Services from the United States ("1993 Secretarial

In neither *Village of Stevens* nor any other case has the Alaska Supreme Court ever squarely had before it the issue of whether an Alaska Native village is a dependent Indian community under 18 U.S.C. § 1151(b). Nor has it revisited *any* issue involving tribal sovereignty since the Secretary's and Congress' subsequent reaffirmation of the tribal status of Alaska Native villages. There is no meaningful conflict between the Ninth Circuit and the Alaska Supreme Court on Venetie's status as a dependent Indian community.

3. The decision below does not conflict with long-standing interpretations of the Department of the Interior. To the contrary, it is consistent with the Department's long established views. In 1932, long before statehood, the Solicitor for the Department concluded that Alaska Native villages possess the inherent tribal authority to govern their own affairs, akin to the powers of tribes in the contiguous 48 states. Status of Alaska Natives, 53 I.D. 593, 605 (1932). That opinion adhered to the terms of the United States - Russia Treaty of Cession of March 30, 1867, putting Alaska tribes on an equal footing with other American tribes,[24] and

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List"), 58 Fed. Reg. 54364 (Oct. 21, 1993); Indian Entities Recognized As Eligible To Receive Services From The United States ("1995 Secretarial List"), 60 Fed. Reg. 9250 (Feb. 16, 1995). *See also,* Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a (under which the Secretary issued subsequent official designations of all federally recognized tribes in Alaska). As the Alaska Supreme Court acknowledges, "once the Executive Branch has determined that [a community] is an Indian tribe, which is a non-justiciable political question, the community is entitled to all of the benefits of tribal status." *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977).

[24] Art. III, 15 Stat. 539, T.S. No. 301 (making provision for the "uncivilized native tribes," and providing "the uncivilized tribes will be subject to such laws and regulations as the United States may, from time

it was also consistent with a numerous statutes, court decisions and administrative determinations both before and after 1932.[25]

To be sure, on January 11, 1993, just before the change of administrations, the outgoing Solicitor issued an opinion during the pendency of this case that ANCSA lands should generally not be considered Indian country. Not only is the 1993 opinion not long-standing nor in harmony with what came before; it has been under substantive reconsideration within the Department ever since its publication.[26] Moreover, the 1993 opinion is directly at odds with the Secretary of the Interior's long-standing treatment of Alaska Natives and their lands, especially in recent years. For instance, in 1980 the Associate Solicitor for Indian Affairs issued an opinion concluding that certain

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to time, adopt in regard to aboriginal tribes of that country"). This sentence has been held to apply the whole body of federal Indian and statutory law to the "Indian tribes of Alaska." *In re Minook*, 2 Alaska 200, 220-221 (1904) (so holding in the context of an Alaska Native citizenship petition).

[25] *See, e.g.*, Status of Alaskan Natives -- Tide Lands, 1 Op. Sol. 104, 105 (1924); Custom Marriage -- Validity -- Alaska, 1 Op. Sol. 329, 330 (1932); Liquor Traffic -- Alaska, 1 Op. Sol. 749, 750 (1937); Fishing Rights of Alaskan Indians, 1 Op. Sol. 1096, 1097 (1942); Alaskan Natives Subject To Territorial School Tax, II Op. Sol. 1196, 1197 (1943); Organization of School Districts On Indian Reservations In Alaska, II Op. Sol. 1755, 1756 (1956); *Petition of McCord*, 151 F. Supp. 132 (D.C. Alaska 1957).

[26] *See* 1993 Secretarial List, 58 Fed. Reg. at 54366 n.1; 1995 Secretarial List, 60 Fed. Reg. at 9251 n.1; (both announcing that the 1993 Solicitor's views on Indian country in Alaska are "under review").

ANCSA village corporation lands were Indian country.[27] On this basis, the Department of the Interior upheld the jurisdiction of the Village of Allakaket to enforce the federal and local Indian liquor laws within its "Indian country" territory pursuant to 18 U.S.C. § 1161. *See Rice v. Rehner*, 463 U.S. 713 (1983). Likewise, under two separate Administrations (and as recently as 1986) the Department has approved the "Indian country" liquor ordinances for three other Alaska Tribes on the same basis.[28]

Plainly the predominant view of Interior officials over the last seventy-five years is that Alaska Native villages have the same rights and governing powers, including Indian country status, as Tribes in the contiguous 48 states. The State's representations otherwise are simply contrary to the facts. Far from being "novel and untried," Pet. 12, Indian country in the form of reservations (both statutory and executive), allotments and restricted Native townsites has existed both long before and well after statehood. *See, e.g., Metlakatla v. Egan*, 369 U.S. 45 (1962); *Kake v. Egan*, 369 U.S. 60 (1962); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Petition of McCord*, 151 F. Supp 132 (D.C. Alaska 1957); David Case, *Alaska Natives and American Laws* 141-147 (Univ. of Alaska 1984); Pub. L. 83-280, 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a). Venetie itself was Indian

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[27] Liquor Ordinance, Village of Allakaket, Unpublished Opinion, Associate Solicitor of Indian Affairs (Oct. 1, 1980). The 1991 Opinion never discusses this conclusion.

[28] *See* Village of Minto Liquor Ordinance, 51 Fed Reg. 28779 (Aug. 11, 1986); Village of Chalkyitsik, Ordinance Prohibiting the Introduction, Possession, and Sale of Intoxicating Beverages, 48 Fed. Reg. 21378 (May 12, 1983); Native Village of Northway, Ordinance Providing for the Introduction, Possession, and Sale of Intoxicating Beverages, 48 Fed Reg. 30195 (June 30, 1983).

country both prior to and after statehood, first by virtue of its aboriginal title, *Bates v. Clark*, 95 U.S. 204 (1877), and later by designation of its executive order reservation, 18 U.S.C. § 1151(a). Congressional action, too, has been consistent: no fewer than 59 post-ANCSA statutes spread across 11 titles have dealt with Alaska Native villages as Indian country, including federal initiatives supporting a variety of tribal environmental, housing and law enforcement programs. *See* Brief Amicus Curiae of the Native Village of Barrow, et al. at 25-34 filed in the court of appeals.

IV. THE NINTH CIRCUIT'S HOLDING THAT CONGRESS THROUGH ANCSA DID NOT EXTINGUISH VENETIE'S INDIAN COUNTRY STATUS IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND THE CLEAR INTENT OF CONGRESS.

1. This Court's jurisprudence establishes that "congressional intent to extinguish Indian country must be reflected by clear and plain language." *United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353 (1941). "A congressional intent to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

The Ninth Circuit's decision is a faithful application of these precedents.[29] Given this Court's prohibition against implicit divestitures, the Court of Appeals had no choice but to conclude that ANCSA did not extinguish Indian

[29] While the State declares that the decision below conflicts with this Court's precedents (Pet. at 23), it provides no basis to support that assertion.

country in Alaska -- a conclusion shared by the leading federal Indian law treatise.[30] Simply put, nowhere in ANCSA does Congress make reference to the extinguishment of Indian country (nor inherent tribal powers such as the power to tax). On this point both the District Court and the Court of Appeals agreed. Pet. App. 71a; 32a.[31] Not only does ANCSA *not* extinguish tribal authority in Indian Country, Congress confirmed this a decade ago in the 1987 Amendments when this very issue was raised: "No provision of this Act shall ... *deny to*, any Native organization any degree of sovereign governmental authority over lands ... or persons in Alaska ... ." Congress further noted that "No provision...shall be construed to *invalidate* ... any assertion that Indian country ... exists or does not exist [in Alaska]" (emphasis added).[32] Resp. 1a-2a. Congress'

[30] *See* Cohen at 766. The State's Petition repeatedly cites the Cohen treatise for various propositions *except* the one relevant to the decision below.

[31] As the Court of Appeals correctly concluded, 43 U.S.C. § 1606(b)'s general statements could not terminate the federal superintendence necessary for continued Indian country status, given Congress' express preservation of the federal-tribal trust in 43 U.S.C. §§ 1601(c) and 1626(a), Congress' deliberate rejection of termination proposals, and Congress' continued trustee role toward Alaska tribes in dozens of statutes enacted since ANCSA. Pet. App. 21a-22a.

[32] As the House Committee on Interior and Insular Affairs observed:

> ANCSA was an Indian land claims settlement act. It was not, at the time, the intent of Congress to deal in any way with the issue of governmental authority of villages in Alaska. If village entities had tribal governing powers under existing law prior to the passage of ANCSA, ANCSA did not effect them. [sic] If they did not have such powers, ANCSA did not bestow them. It is the intent of the Committee that this

studied intent in ANCSA to remain silent and neutral on the issue of Indian country fully supports the Court of Appeals'

> is an issue which should be left to the courts in interpreting applicable law.

H.R. Rep. No. 99-712 at 27 (1986) (emphasis added). On the eve of ANCSA's passage, Alaska Senator Ted Stevens, cosponsor of both the original enactment and all its various amendments since 1971, made clear that ANCSA was not a "termination" act:

> We have basic agreement on the amount of money. We also have basic agreement on the amount of land, and we have basic agreement on the fact that the Alaska Native people themselves should have the right to self-determination. *This is consistent with the President's policy of self-determination without termination.*

117 Cong. Rec. 38440 (1971) (emphasis added). More recently, Senator Stevens noted the significance of ANCSA's earlier silence in this area:

> [ANCSA] did not terminate the special relationship between Alaska Natives and the Federal Government or resolve any questions concerning the governmental status, if any, of various Native groups. There's not one reference to sovereignty in ANCSA or in the 1971 Conference report. The Act's declaration of settlement is very clear. It extinguishes aboriginal claims of settlement and aboriginal hunting and fishing rights, and nothing more or less.

Hearings on S. 2065 before the Subcommittee on Public Lands of the Senate Committee on Energy and Natural Resources, 99th Cong., 2d Sess. 329 (1986). Although the views of one Senator may not be particularly probative, these contemporaneous views certainly undercut Senator Stevens' more recent recharacterizations of ANCSA on this issue.

conclusion that ANCSA did not extinguish Venetie's Indian country status.[33]

2. In the end, the plain fact is that ANCSA did not address, much less terminate, the Indian country status of Venetie's lands.[34] If the State disagrees, it can take its case to Congress which has the plenary and exclusive authority to rewrite ANCSA. Nearly every Congress since 1971 has returned to amend ANCSA (a total of 29 enactments since its original passage). Indeed, were it not for the State's strategic concern that legislative action would further discourage this Court from granting review, such legislative activity would already be well underway.[35] In such

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[33] The Ninth Circuit correctly understood, as this Court has stated, that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991). The court below declined to read into ANCSA a provision Congress expressly chose not to include. Indeed, as noted by the Ninth Circuit (Pet. App. 21a) Congress rejected legislative language that would have done precisely what the State urges here -- supplanted federal superintendence of Alaska Natives with state authority. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993) ("[W]e are mindful that Congress had before it, but failed to pass, just such a scheme.... We are directed by those [enacted] words, and not by the discarded draft"). For a comparison of statutes where Congress knows well how to state its intent to terminate Indian country status, *see, e.g.*, Klamath Tribes Termination Act, 25 U.S.C. § 564(q); Menominee Tribe Termination Act, 25 U.S.C. § 891 *et seq.*; Peoria Tribe of Oklahoma Termination Act, 25 U.S.C. § 821 *et seq.*

[34] It did, however, specifically allow Venetie to keep its pre-existing Reservation in fee status.

[35] Letter of February 17, 1997, from Hon. Governor Knowles to State Senate President Miller and State House Speaker Phillips, committing not to spend appropriated funds to lobby Congress until after review by this Court since "any activities other than legal action, might well undercut

circumstances, and in addition to the other reasons for denying the Petition, this case does not warrant further review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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our efforts to gain Supreme Court review and a favorable ruling."

APPENDIX

ALASKA NATIVE CLAIMS SETTLEMENT ACT AMENDMENTS OF 1987

Sec. 2. "The Congress finds and declares that--

(8) no provision of this Act shall--

(B) confer on, or deny to, any Native organization, any degree of sovereign governmental authority over lands (including management, or regulation of the taking fish and wildlife) or persons in Alaska;

Pub. L. 100-241, 101 Stat. 1788, 43 U.S.C. § 1601 note.

Sec. 17

(a) No provision of this Act [the Alaska Native Claims Settlement Act Amendments of 1987], exercise of authority pursuant to this Act, or change made by, or pursuant to, this Act in the status of land shall be construed to validate or invalidate or in any way affect -

(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 [the IRA] as amended) has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the

boundaries of the State of Alaska, or

(2) any assertion that Indian country (as defined by 18 U.S.C. § 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska."

Pub. L. 100-241, 101 Stat. 1814, 43 U.S.C. § 1601 note.